IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10-03-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA

WRIT PETITION NO.6345 OF 1998

S. Suyambulingam,
No.22, Boltonpuram I Street,
Tuticorin 628 003. .. Petitioner

Vs.

1. The Tuticorin Port Trust,
   rep. by its Chairman,
   Tuticorin - 628 003.

2. P. Pathiran,
   Executive Engineer (Civil)
   Tuticorin Port Trust,
   Tuticorin - 628 004

3. K. Sunderaraju,
   Executive Engineer (Civil)
   Tuticorin Port Trust,
   Tuticorin - 628 004 .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of writ of Declaration declaring that the action of the 1st respondent in promoting the 2nd and 3rd respondents as Executive Engineers (on ad-hoc basis) as per its Orders No.S-1/38/93-E.I.(Vol.II) dated 2.5.1997 as illegal and unconstitutional and consequently direct the 1st respondent to promote the petitioner as Executive Engineer with effect from 2.5.97 with all consequential benefits of seniority, arrears of pay and other benefits, award costs.

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For Petitioner : Mr.N.G.R. Prasad for M/s. Row & Reddy

For Respondent-1 : Mr.V.P. Venkat for Mr.Anand

For Respondents 2-3 : M/s.Anand, Abdul & Vinodh Associates

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J U D G M E N T

The dispute in the present writ petition relates to question of promotion to the post of Executive Engineer (Civil) under the Tuticorin Port Trust, present Respondent No.1. The promotion to such post of Executive Engineer (Civil) takes place from amongst the Assistant Executive Engineers (Civil). As per the departmental norms, such posts are to be filled from amongst the diploma holders and degree holders in the ratio of 1:2. The petitioner has prayed for a declaration that the action of the first respondent in promoting the respondents 2 and 3 as Executive Engineers on adhoc basis as per order dated 2.5.1997 is illegal and for a consequential direction to the first respondent to promote the petitioner as Executive Engineer with effect from 2.5.1997 with all consequential benefits, seniority as well as pay, etc.

2. From the relevant averments made in the writ petition as well as the counter affidavit, the following facts are no longer in dispute.

The petitioner joined service under the first respondent as Junior Engineer on 13.8.1979 in the pay scale of 425-500-560-700. The second respondent first joined service as Work Inspector I Grade in a lower pay scale of Rs.330-370-400-480. Subsequently, the second respondent was promoted as Junior Engineer (Civil) on adhoc basis with effect from 1.4.1982 and subsequently appointed as Technical Assistant (subsequently re-designated as Junior Engineer) by transfer on adhoc basis on 14.9.1988. Initially the petitioner as well as the respondents 2 and 3 were diploma holders. Subsequently, while they were in service, they acquired B.E. degree. The petitioner acquired such B.E. degree in April, 1989, whereas the respondents 2 and 3 obtained such degree earlier in November 1988 and November 1986 respectively. Thereafter the petitioner and the respondents 2 and 3 were promoted as Assistant Engineers on different dates. Subsequently, the petitioner and the second respondent were promoted as Assistant Executive Engineers on 21.10.1993 and the third respondent was promoted with effect from 16.4.1994. At that stage, a draft seniority list relating to Assistant Executive Engineer was notified on 11.11.1994. In such seniority list, the petitioner was shown at Serial No.36, the second respondent was shown at Serial No.37 and the third respondent was shown at Serial No.40. While the matter stood thus, four vacancies in the post of Executive Engineer arose and out of such vacancies, one vacancy was to be filled up from among the diploma holders and three vacancies from among the degree holders. At that stage, the Departmental Promotion Committee met on 29.4.1997 and apparently treated Respondents 2 and 3 as senior to the petitioner solely on the ground that

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Respondents 2 and 3 had acquired B.E. Degree earlier than the petitioner and on that basis orders of promotion were issued promoting the respondents 2 and 3 ahead of the petitioner. The petitioner immediately filed a representation which having been rejected, the present writ petition has been filed.

3. In the counter affidavit filed on behalf of Respondent No.1, re-structuring made from time to time has been indicated. For the purpose of deciding the present writ petitions, those averments are not necessary. So far as the present case is concerned, the relevant averment is to the effect that DPC, which met on 29.4.1997, revised the seniority on the basis that Respondents 2 and 3 had acquired the degree of Bachelor in Engineering earlier than the present petitioner and, therefore, they were treated as seniors.

4. Learned counsel appearing for the petitioner has submitted that in the absence of any specific rule that seniority would be regulated on the basis of the date of acquisition of the degree, the first respondent should not have treated Respondents 2 and 3 as seniors to the petitioner merely because they had acquired B.E. degree before such degree was acquired by the present petitioner.

5. Learned counsel has further submitted that if the petitioner is held to be senior to the respondents 2 and 3 in the rank of Assistant Executive Engineer, his case for promotion even on adhoc basis to the post of Executive Engineer should not have been ignored by giving promotion to juniors.

6. Learned counsel appearing for the first respondent has submitted that since promotion to the post of Executive Engineer is from two sources of Assistant Executive Engineers, namely, diploma holders and degree holders, and since Respondents 2 and 3 had acquired the Bachelor degree in Engineering earlier to the petitioner, they had been rightly treated as senior and the promotion of Respondents 2 and 3 cannot be found to be erroneous.

7. It is no doubt true that the promotion to the post of Executive Engineer (Civil) is required to be made from two sources, namely, diploma holders and degree holders. However, on the date when the consideration for promotion arose, the petitioner as well as the respondents 2 and 3 were degree holders. In other words, all of them were eligible to the considered for promotion as degree holders. There is no specific rule in the Department which gives seniority to a person who acquires the degree earlier than another person. Therefore, there was no reason for the DPC to review the earlier decision.

8. The aforesaid conclusion receives considerable

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support from the decision of the Supreme Court reported in 1999 SCC (L&S) 1216 (R.B. DESAI AND ANOTHER v. S.K. KHANOLKER AND OTHERS), wherein the Supreme Court has held as follows :-

> "9. ... On facts, there is no dispute that the appellants entered the RFOs' cadre on a date anterior to that of the first respondent, therefore, in the cadre of RFOs, the appellants are senior to the first respondent. However, to be considered for promotion, the rule required RFOs to acquire the eligibility as provided therein. Therefore, the question for consideration is: can the acquisition of an earlier eligibility give an advantage to the first respondent as against the appellants when an avenue for promotion opens in the cadre of ACFs even though at that point of time the appellants had also acquired the required eligibility? We are of the opinion that if at the time of consideration for promotion the candidates concerned have acquired the eligibility, then unless the rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. The rule under consideration does not give any such priority to the candidates acquiring earlier eligibility and, in our opinion, rightly so. In service law, seniority has its own weightage and unless and until the rules specifically exclude this weightage of seniority, it is not open to the authorities to ignore the same." (Emphasis added)

9. It is of course true that the DPC was also considering the question of promotion of diploma holders as there was some objection to the effect that proper ratio has not been maintained, but while considering the case of diploma holders, there was no occasion to upset the seniority of the degree holders inter se. The third respondent was promoted as Assistant Executive Engineer on 16.4.1994, whereas the petitioner as well as the second respondent were promoted on 21.10.1993. On the aforesaid basis the petitioner was atleast senior to the third respondent. It is not the case of the Department that the case of the petitioner was considered and was overlooked for some valid reason. Since the petitioner has to be treated as senior, by ignoring his case, the other two respondents, namely, Respondents 2 and 3, should not have been promoted ahead of the petitioner unless there was specific reason for overlooking him.

10. Since Respondents 2 and 3 have functioned in the promotional post and subsequently the petitioner has also been given promotion, the first respondent is now required to consider the case of promotion of the present petitioner with effect from 2.5.1997, when two juniors had been promoted, and if it is found

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that the petitioner was fit for promotion in accordance with the Rules, he should be given notional promotion from the said date and the financial benefit on such notional basis should be calculated and given to him with effect from the actual date of promotion. The earlier period also should be notionally counted for other service benefits such as seniority, pension, etc., in accordance with the rules. However, no arrear is payable for the period prior to 2.5.1997.

11. For the aforesaid reasons, the writ petition is allowed to the extent indicated above. The direction should be complied with within a period of four months from the date of receipt of the order. There would be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

dpk

To

1. The Tuticorin Port Trust,
   rep. by its Chairman,
   Tuticorin - 628 003.

1 cc to M/s. Anand Abdul and Vinodh Associates, Sr. 11938
1 cc to M/s. Row and Reddy, Sr. 11679

WP.6345/1998

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